

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

NICHOLE MAY, ) No. CV 17-4085-PLA  
Plaintiff, ) **MEMORANDUM OPINION AND ORDER**  
v. )  
NANCY BERRYHILL, ACTING )  
COMMISSIONER OF SOCIAL )  
SECURITY ADMINISTRATION, )  
Defendant. )

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## **PROCEEDINGS**

Plaintiff filed this action on June 1, 2017, seeking review of the Commissioner's denial of her application for Supplemental Security Income ("SSI") payments. The parties filed Consents to proceed before a Magistrate Judge on July 5, 2017, and July 28, 2017. Pursuant to the Court's Order, the parties filed a Joint Stipulation (alternatively "JS") on March 14, 2018, that addresses their positions concerning the disputed issues in the case. The Court has taken the Joint Stipulation under submission without oral argument.

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## **BACKGROUND**

Plaintiff was born on September 10, 1974. [Administrative Record ("AR") at 32, 43, 62.] She has past relevant work experience as a receptionist, personal assistant/attendant, and cosmetic salesperson. [AR at 31-32, 56.]

On July 9, 2013, plaintiff filed an application for SSI payments, alleging that she has been unable to work since July 29, 2012. [AR at 20.] After her application was denied initially and upon reconsideration, plaintiff timely filed a request for a hearing before an Administrative Law Judge (“ALJ”). [AR at 115-17.] A hearing was held on November 17, 2015, at which time plaintiff appeared represented by an attorney, and testified on her own behalf. [AR at 41-61.] A vocational expert (“VE”) also testified. [AR at 55-60.] On February 3, 2016, the ALJ issued a decision concluding that plaintiff was not under a disability since July 9, 2013, the date the application was filed. [AR at 20-33.] Plaintiff requested review of the ALJ’s decision by the Appeals Council. [AR at 15-16.] When the Appeals Council denied plaintiff’s request for review on April 25, 2017 [AR at 1-6], the ALJ’s decision became the final decision of the Commissioner. See Sam v. Astrue, 550 F.3d 808, 810 (9th Cir. 2008) (per curiam) (citations omitted). This action followed.

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## **STANDARD OF REVIEW**

Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner's decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence or if it is based upon the application of improper legal standards. Berry v. Astrue, 622 F.3d 1228, 1231 (9th Cir. 2010) (citation omitted).

“Substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017) (citation omitted). “Where

1 evidence is susceptible to more than one rational interpretation, the ALJ's decision should be  
2 upheld." Id. (internal quotation marks and citation omitted). However, the Court "must consider  
3 the entire record as a whole, weighing both the evidence that supports and the evidence that  
4 detracts from the Commissioner's conclusion, and may not affirm simply by isolating a specific  
5 quantum of supporting evidence." Id. (quoting Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir.  
6 2014) (internal quotation marks omitted)). The Court will "review only the reasons provided by the  
7 ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not  
8 rely." Id. (internal quotation marks and citation omitted); see also SEC v. Chenery Corp., 318 U.S.  
9 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943) ("The grounds upon which an administrative order  
10 must be judged are those upon which the record discloses that its action was based.").

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#### IV.

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#### **THE EVALUATION OF DISABILITY**

14 Persons are "disabled" for purposes of receiving Social Security benefits if they are unable  
15 to engage in any substantial gainful activity owing to a physical or mental impairment that is  
16 expected to result in death or which has lasted or is expected to last for a continuous period of at  
17 least twelve months. Garcia v. Comm'r of Soc. Sec., 768 F.3d 925, 930 (9th Cir. 2014) (quoting  
18 42 U.S.C. § 423(d)(1)(A)).

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#### **A. THE FIVE-STEP EVALUATION PROCESS**

20 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing  
21 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lounsbury v. Barnhart, 468  
22 F.3d 1111, 1114 (9th Cir. 2006) (citing Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999)).  
23 In the first step, the Commissioner must determine whether the claimant is currently engaged in  
24 substantial gainful activity; if so, the claimant is not disabled and the claim is denied. Lounsbury,  
25 468 F.3d at 1114. If the claimant is not currently engaged in substantial gainful activity, the  
26 second step requires the Commissioner to determine whether the claimant has a "severe"  
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1 impairment or combination of impairments significantly limiting her ability to do basic work  
2 activities; if not, a finding of nondisability is made and the claim is denied. Id. If the claimant has  
3 a “severe” impairment or combination of impairments, the third step requires the Commissioner  
4 to determine whether the impairment or combination of impairments meets or equals an  
5 impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R. § 404, subpart P,  
6 appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. If the  
7 claimant’s impairment or combination of impairments does not meet or equal an impairment in the  
8 Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient  
9 “residual functional capacity” to perform her past work; if so, the claimant is not disabled and the  
10 claim is denied. Id. The claimant has the burden of proving that she is unable to perform past  
11 relevant work. Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992). If the claimant meets  
12 this burden, a prima facie case of disability is established. Id. The Commissioner then bears  
13 the burden of establishing that the claimant is not disabled because there is other work existing  
14 in “significant numbers” in the national or regional economy the claimant can do, either (1) by  
15 the testimony of a VE, or (2) by reference to the Medical-Vocational Guidelines at 20 C.F.R. pt.  
16 404, subpt. P, app. 2. Lounsbury, 468 F.3d at 1114. The determination of this issue comprises  
17 the fifth and final step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester v.  
18 Chater, 81 F.3d 721, 828 n.5 (9th Cir. 1995); Drouin, 966 F.2d at 1257.

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20 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

21 At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since  
22 July 9, 2013, the application date. [AR at 22.] At step two, the ALJ concluded that plaintiff has  
23 the severe impairments of degenerative disc disease of the lumbar spine with radiculopathy;  
24 trochanteric bursitis; obesity; hypothyroidism; hypertension; major depressive disorder; post-  
25 traumatic stress disorder (“PTSD”); attention deficit disorder (“ADD”); panic disorder; cognitive  
26 impairment; and history of opiate dependence. [Id.] At step three, the ALJ determined that  
27 plaintiff does not have an impairment or a combination of impairments that meets or medically  
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1 equals any of the impairments in the Listing. [Id.] The ALJ further found that plaintiff retained the  
2 residual functional capacity ("RFC")<sup>1</sup> to perform sedentary work as defined in 20 C.F.R. §  
3 416.967(a),<sup>2</sup> as follows:

4 [She] has the residual functional capacity to perform sedentary work . . . including  
5 lifting up to 5 pounds frequently and up to 10 pounds occasionally, sitting up to 6  
6 hours total in an 8-hour workday, and standing/walking up to 2 hours total in an[] 8-  
7 hour workday, with the following restrictions: she must avoid ladders, ropes and  
8 scaffolds as well as workplace hazards; she can only occasionally climb ramps and  
9 stairs; she can only occasionally balance, kneel, crouch, and crawl; she requires a  
10 one-minute break after one hour of being in any position; and she is limited to  
11 unskilled work with occasional public contact.

12 [AR at 24.] At step four, based on plaintiff's RFC and the testimony of the VE, the ALJ concluded  
13 that plaintiff is unable to perform any of her past relevant work as a receptionist, personal  
14 assistant/attendant, and cosmetic salesperson. [AR at 31-32, 57.] At step five, based on plaintiff's  
15 RFC, vocational factors, and the VE's testimony, the ALJ found that there are jobs existing in  
16 significant numbers in the national economy that plaintiff can perform, including work as an  
17 "addresser" (Dictionary of Occupational Titles ("DOT") No. 209.587-010), "bonder, electronics"  
18 (DOT No. 726.685-066), and "touch-up screener" (DOT No. 726.684-010). [AR at 32-33, 57-59.]  
19 Accordingly, the ALJ determined that plaintiff was not disabled at any time since July 9, 2013, the  
20 application date. [AR at 33.]

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23 <sup>1</sup> RFC is what a claimant can still do despite existing exertional and nonexertional  
24 limitations. See Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). "Between steps  
25 three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which  
26 the ALJ assesses the claimant's residual functional capacity." Massachi v. Astrue, 486 F.3d 1149,  
27 1151 n.2 (9th Cir. 2007) (citation omitted).

28 <sup>2</sup> "Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting  
or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined  
as one which involves sitting, a certain amount of walking and standing is often necessary in  
carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and  
other sedentary criteria are met." 20 C.F.R. § 416.967(a).

V.

## **THE ALJ'S DECISION**

Plaintiff contends that the ALJ erred when she: (1) discounted plaintiff's subjective symptom testimony and the testimony of lay witnesses; (2) assessed the medical evidence; (3) determined at step three of the sequential evaluation that plaintiff's mental and physical impairments or combination of impairments, did not meet or equal a listed impairment, including listings 12.02 and/or 12.05; and (4) committed harmful error at step five of the sequential evaluation because the occupation of "addresser" is obsolete, the occupation of touch up screener is not compatible with "unskilled" work, and none of the three occupations accommodates her need to take a one-minute break every hour. [JS at 3.] As set forth below, the Court agrees with plaintiff, in part, and remands for further proceedings.

## A. SUBJECTIVE SYMPTOM TESTIMONY

## **1. Legal Standard**

To determine the extent to which a claimant's symptom testimony must be credited, the Ninth Circuit has "established a two-step analysis." Trevizo v. Berryhill, 871 F.3d 664, 678 (9th Cir. 2017) (citing Garrison, 759 F.3d at 1014-15); see also Soc. Sec. Ruling ("SSR")<sup>3</sup> 16-3p.<sup>4</sup>

<sup>3</sup> “SSRs do not have the force of law. However, because they represent the Commissioner’s interpretation of the agency’s regulations, we give them some deference. We will not defer to SSRs if they are inconsistent with the statute or regulations.” Holohan v. Massanari, 246 F.3d 1195, 1202 n.1 (9th Cir. 2001) (citations omitted).

<sup>4</sup> On March 28, 2016, shortly after the ALJ’s decision in this case, SSR 16-3p went into effect. See SSR 16-3p, 2016 WL 1119029 (Mar. 16, 2016). SSR 16-3p supersedes SSR 96-7p, the previous policy governing the evaluation of subjective symptoms. *Id.* at \*1. SSR 16-3p indicates that “we are eliminating the use of the term ‘credibility’ from our sub-regulatory policy, as our regulations do not use this term.” *Id.* Moreover, “[i]n doing so, we clarify that subjective symptom evaluation is not an examination of an individual’s character[:] [i]nstead, we will more closely follow our regulatory language regarding symptom evaluation.” *Id.*; *Trevizo*, 871 F.3d at 678 n.5. Thus, the adjudicator “will not assess an individual’s overall character or truthfulness in the manner typically used during an adversarial court litigation. The focus of the evaluation of an individual’s symptoms should not be to determine whether he or she is a truthful person.” 2016 WL 1119029, at \*10. The ALJ is instructed to “consider all of the evidence in an individual’s (continued...)

(continued...)

1 "First, the ALJ must determine whether the claimant has presented objective medical evidence  
2 of an underlying impairment which could reasonably be expected to produce the pain or other  
3 symptoms alleged." Id. (quoting Garrison, 759 F.3d at 1014-15); Treichler v. Comm'r of Soc. Sec.  
4 Admin., 775 F.3d 1090, 1102 (9th Cir. 2014) (quoting Lingenfelter v. Astrue, 504 F.3d 1028, 1036  
5 (9th Cir. 2007)) (internal quotation marks omitted). If the claimant meets the first test, and the ALJ  
6 does not make a "finding of malingering based on affirmative evidence thereof" (Robbins v. Soc.  
7 Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006)), the ALJ must "evaluate the intensity and  
8 persistence of [the] individual's symptoms . . . and determine the extent to which [those] symptoms  
9 limit his . . . ability to perform work-related activities . . ." SSR 16-3p, 2016 WL 1119029, at \*4.  
10 An ALJ must provide specific, clear and convincing reasons for rejecting a claimant's testimony  
11 about the severity of her symptoms. Trevizo, 871 F.3d at 678 (citing Garrison, 759 F.3d at 1014-  
12 15); Treichler, 775 F.3d at 1102. During this inquiry, the ALJ may use "ordinary techniques of  
13 credibility evaluation, such as . . . prior inconsistent statements." Ghanim v. Colvin, 763 F.3d  
14 1154, 1163 (9th Cir. 2014) (quoting Smolen, 80 F.3d at 1284). The ALJ may also consider any  
15 inconsistencies in the claimant's conduct and any inadequately explained or unexplained failure  
16 to pursue or follow treatment. Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012).

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## 18       **2. Plaintiff's Subjective Symptom Testimony**

19       The ALJ generally discounted plaintiff's subjective symptom testimony "because the  
20 objective clinical findings do not support the extreme limitations alleged." [AR at 25.] Plaintiff  
21 contends the ALJ failed to articulate legally sufficient reasons for rejecting plaintiff's subjective

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23       <sup>4</sup>(...continued)

24 record," "to determine how symptoms limit ability to perform work-related activities." Id. at \*2. The  
25 Ninth Circuit in Trevizo noted that SSR 16-3p "makes clear what our precedent already required:  
26 that assessments of an individual's testimony by an ALJ are designed to 'evaluate the intensity  
27 and persistence of symptoms after [the ALJ] find[s] that the individual has a medically  
determinable impairment(s) that could reasonably be expect to produce those symptoms,' and 'not  
to delve into wide-ranging scrutiny of the claimant's character and apparent truthfulness.'" Trevizo,  
871 F.3d at 678 n.5 (citing SSR 16-3p).

28       The ALJ's February 2016 decision was issued before March 28, 2016, when SSR 16-3p  
became effective. Notwithstanding the foregoing, SSR 16-3p shall apply on remand.

1 symptom testimony. [JS at 3-7, 14-15.]

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3           **a. Physical Symptom Testimony**

4         After reviewing the objective medical evidence and plaintiff's allegations relating to her  
5 physical conditions, the ALJ found plaintiff's allegations "less than fully credible because the  
6 objective clinical findings do not support the extreme limitations alleged." [AR at 25.] She further  
7 noted:

8         [T]he objective medical evidence is consistent with a physical residual functional  
9 capacity finding limiting [plaintiff] to sedentary work with the postural and  
10 environmental limitations described above. Additionally, the undersigned has  
11 considered [plaintiff's] allegations and testimony regarding her lower back pain and  
12 difficulty with prolonged sitting and standing, and determined that a sit/stand option  
13 is appropriate and consistent with the evidence.

[AR at 27.]

While a lack of objective medical evidence supporting a plaintiff's subjective complaints cannot provide the only basis to reject a claimant's subjective symptom testimony (Trevizo, 871 F.3d at 679 (quoting Robbins, 466 F.3d at 883)), it is one factor that an ALJ can consider in evaluating symptom testimony. See Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) ("Although lack of medical evidence cannot form the sole basis for discounting pain testimony, it is a factor the ALJ can consider in his credibility analysis."); accord Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

Here, the ALJ reviewed plaintiff's subjective symptom testimony and stated that she was "not entirely credible for the reasons explained in th[e] decision." [AR at 25.] The ALJ then reviewed the medical evidence regarding plaintiff's physical conditions. [AR at 25-27.] As noted by the ALJ, that evidence included x-ray and MRI evidence (in September 2012 and November 2015) of advanced degenerative disc changes in the lumbar spine; treatment with a pain management specialist that included at least four rounds of epidural steroid injections, as well as bilateral facet medial branch blocks; physical examination evidence consistently showing decreased range of motion of the lumbar spine, with "severe pain and guarding," and "severe

1 tenderness" to palpation, as well as an antalgic gait, and positive straight leg raising tests; an EMG  
2 in November 2012 that "confirmed ongoing mild bilateral L5 nerve root irritations," and another in  
3 November 2015 that reflected "bilateral, chronic L5 and S1 radiculopathies"; an internal medicine  
4 consultative examination in November 2013 that reflected muscle spasm, tenderness, decreased  
5 range of motion of the lumbar spine, positive straight leg raising tests, a slightly antalgic gait, and  
6 decreased motor strength and sensation in the right leg, with an x-ray showing evidence of a  
7 paraspinal muscle spasm with moderately severe degenerative disc disease at L5-S1; and  
8 treatment with a number of narcotic medications (including Norco, Percocet, and Valium, which  
9 plaintiff testified she was taking daily [AR at 50]), with plaintiff admitting in April 2015 that she was  
10 "taking up to 4 Norco per day to control the pain." [AR at 25-27 (citations omitted).] The ALJ also  
11 commented on a few treatment notes purportedly showing improvement,<sup>5</sup> e.g., plaintiff reported  
12 in November 2012 that "her symptoms improved" after the epidural steroid injections "at the  
13 sacroiliac joint and in the right trochanteric bursa"; her treating pain management doctor reported  
14 in December 2012 that she "had made significant progress after the second epidural steroid  
15 injection" and "continued to improve her daily activity and functional capacity" (although, as noted  
16 by the ALJ, the doctor at that time *again* administered additional steroid injections and medial  
17 branch blocks, recommended physical therapy, and decreased plaintiff's pain medications -- and  
18 plaintiff returned a month later in January 2013 reporting increased pain); in November 2014  
19 plaintiff reported to her doctor that she was "doing much better" and "experiencing only  
20 'intermittent lower back pain"'; and in June and August 2015 her physical examinations "showed  
21 improvement in functionality" (although she also reported in August 2015 that she reinjured her  
22 back and underwent an MRI, which showed moderate-severe facet arthropathy and severe disc  
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24       <sup>5</sup> Even if the ALJ intended this to be a second reason for discounting plaintiff's subjective  
25 symptom testimony -- which is not entirely clear -- an ALJ must consider all of the relevant  
26 evidence in the record and may not point to only those portions of the records that bolster her  
27 findings. See, e.g., Holohan, 246 F.3d at 1207-08 (holding that an ALJ cannot selectively rely on  
28 some entries in plaintiff's records while ignoring others). In this case, the record -- including the  
clinical findings -- more consistently reflects plaintiff's chronic pain and limitations with only  
occasional and short-lived evidence of improvement with treatment.

1 dessication and moderate disc height loss, with a circumferential disc bulge that “may contact the  
2 bilateral exiting L5 nerve roots,” and an EMG study reflecting bilateral, chronic L5 and S1  
3 radiculopathies). [AR at 25-27.] The ALJ then stated her conclusion that “the objective medical  
4 evidence is consistent with a physical [RFC] finding limiting [plaintiff] to sedentary work with the  
5 postural and environmental limitations described” in the RFC. [AR at 27.] She also stated that  
6 she “considered” plaintiff’s allegations and testimony regarding her lower back pain and difficulty  
7 with prolonged sitting and standing, and “determined that a sit/stand option is appropriate and  
8 consistent with the evidence.” [AR at 27.]

9       As the Ninth Circuit recently held, “an ALJ’s ‘vague allegation’ that a claimant’s testimony  
10 is ‘not consistent with the objective medical evidence,’ without any ‘specific finding in support’ of  
11 that conclusion, is insufficient.” Treichler, 775 F.3d at 1103 (citation omitted); see Laborin v.  
12 Berryhill, 867 F.3d 1151, 1153 (9th Cir. 2017) (ALJ’s statement that plaintiff’s testimony regarding  
13 the intensity, persistence, and limiting effects of his symptoms was not credible to the extent his  
14 testimony is “inconsistent with the above residual functional capacity assessment” is an insufficient  
15 basis for discrediting testimony).<sup>6</sup> The “ALJ must identify the testimony that was not credible, and  
16 specify ‘what evidence undermines the claimant’s complaints.’” Treichler, 775 F.3d at 1103  
17 (citation omitted); Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015). Here, the ALJ did  
18 not identify the testimony she found not credible and “link that testimony to the particular parts of  
19 the record” supporting her credibility determination. Brown-Hunter, 806 F.3d at 494. In short,  
20 “[t]his is not the sort of explanation or the kind of ‘specific reasons’ we must have in order to review  
21 the ALJ’s decision meaningfully, so that we may ensure that the claimant’s testimony was not

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23       <sup>6</sup> In Laborin, the Ninth Circuit found that the ALJ’s “boilerplate” language discrediting the  
24 claimant’s testimony because it is inconsistent with the RFC indicates that the ALJ “did not  
25 properly ‘incorporate a claimant’s testimony regarding subjective symptoms and pain into the RFC  
26 finding, as [he or she] is required to do.’” Laborin, 867 F.3d at 1153 (citations omitted; alteration  
27 in original). Here, the ALJ’s “boilerplate” language stating that the RFC was consistent with the  
28 objective medical evidence, also appears to indicate that the ALJ did not properly incorporate  
plaintiff’s testimony regarding her symptoms and limitations into the RFC, notwithstanding the  
ALJ’s determination to include an option for plaintiff to take a one-minute break after one hour of  
being in any position. See id. at 1153 n.4 (stating that an ALJ “cannot . . . properly evaluate the  
claimant’s credibility based on a predetermined RFC”).

1 arbitrarily discredited," nor can the error be found harmless. Id. at 493 (rejecting the  
2 Commissioner's argument that because the ALJ set out his RFC and summarized the evidence  
3 supporting his determination, the Court can infer that the ALJ rejected the plaintiff's testimony to  
4 the extent it conflicted with that medical evidence, because the ALJ "never identified *which*  
5 testimony [he] found not credible, and never explained *which* evidence contradicted that  
6 testimony") (citing Treichler, 775 F.3d at 1103, Burrell v. Colvin, 775 F.3d 1133, 1138 (9th Cir.  
7 2014)).

8 Additionally, although the ALJ stated that based on plaintiff's testimony that she had  
9 difficulty with prolonged sitting and standing a "sit/stand option is appropriate and consistent with  
10 the evidence," it is improper for an ALJ to substitute her own opinion for that of a medical  
11 professional. See Banks v. Barnhart, 434 F. Supp. 2d 800, 805 (C.D. Cal. 2006) ("An ALJ cannot  
12 arbitrarily substitute [her] own judgment for competent medical opinion and [s]he must not  
13 succumb to the temptation to play doctor and make [her] own independent medical findings.")  
14 (internal quotation marks, alterations, and citations omitted). Indeed, the ALJ did not explain how  
15 the alleged "sit/stand option" -- which was only stated in the RFC determination to be a "one-  
16 minute break after one hour of being in any position" -- was in any way consistent with plaintiff's  
17 medical treatment records or her testimony regarding her pain; neither did the ALJ point to any  
18 evidence showing that taking a "one-minute break" after an hour of being in "any position" would  
19 give plaintiff sufficient relief from her pain such that she could then continue working. In fact,  
20 plaintiff testified that she can only sit or stand for about five to ten minutes at a time before getting  
21 "really uncomfortable" [AR at 53], and her treating physician Mark Smith, M.D., opined that plaintiff  
22 "would be unable to perform the demands of even sedentary work," as she is incapable of sitting  
23 for more than a total of 15 minutes in an 8-hour workday.<sup>7</sup> [AR at 30 (citation omitted).]

24 Based on the foregoing, lack of medical evidence cannot form the sole basis for discounting  
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26     <sup>7</sup> As discussed herein, the Court will not address whether the ALJ's reasons for discounting  
27 the medical opinions of plaintiff's treating physicians were specific and legitimate. The ALJ on  
28 remand must provide legally sufficient reasons for the weight given to the medical opinions of  
record.

1 pain testimony and, even if the Court considers that in addition to relying on the objective medical  
2 evidence to discount plaintiff's testimony the ALJ implicitly included evidence of improvement in  
3 plaintiff's physical condition as a second reason for discounting plaintiff's subjective symptom  
4 testimony, neither reason was a specific, clear and convincing reason supported by substantial  
5 evidence for discounting plaintiff's subjective symptom pain testimony.

6 Remand is warranted on this issue.

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8           **b. Mental Health Testimony**

9 With respect to plaintiff's mental health allegations, the ALJ concluded the following:

10 Ultimately, the objective medical evidence regarding [plaintiff's] mental impairments  
11 are not commensurate with disabling limitations. While [she] seemed to have been  
12 struggling with increased symptoms around the time of her onset date, she appears  
to have stabilized significantly by 2013 and remained as such, with only brief periods  
of increased symptoms through 2015 . . . .

13 [AR at 29.]

14 Plaintiff argues that "the longitudinal picture of her emotions is bleak." [JS at 5.] She notes  
15 that she has been treated "with a number of different medications that were frequently changed  
16 and tampered with, in an attempt to control her symptoms." [Id.] Additionally, she frequently  
17 reported hallucinations and sleep disturbances. [JS at 5-6 (citing AR at 286, 294, 295, 307, 388).]  
18 She argues that the lack of objective medical evidence as to mental illness is not a specific, clear  
19 and convincing reason to discredit plaintiff's subjective reports of psychiatric symptoms, especially  
20 because "objective testing is different where a mental, as opposed to a physical, impairment is at  
21 issue." [JS at 14.] Defendant responds that "Plaintiff's allegations of a disabling mental  
22 impairment are not fully credible because the record routinely notes a mild condition that is stable  
23 with treatment." [JS at 11 (citing AR at 28-29).] Defendant then points to some of plaintiff's  
24 treating records showing "only mild recurrent depression," mental status examinations that were  
25 "entirely normal," and records showing that plaintiff was "stable on meds." [JS at 11-12 (citing AR  
26 at 446-47, 479, 625-26, 631-32, 639-40).] Defendant submits that "[e]xcept on one occasion,  
27 these records show no more than moderate functional limitations," and "routinely show successful  
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1 treatment using medication and therapy.” [JS at 12 (citing AR at 625-64).]

2 As the Ninth Circuit recently explained, “[c]ycles of improvement and debilitating symptoms  
3 are a common occurrence, and in such circumstances it is error for an ALJ to pick out a few  
4 isolated instances of improvement over a period of months or years and to treat them as a basis  
5 for concluding a claimant is capable of working.” Garrison, 759 F.3d at 1017 (citing Holohan, 246  
6 F.3d at 1205); see also Scott v. Astrue, 647 F.3d 734, 739-40 (7th Cir. 2011) (citations omitted)  
7 (“There can be a great distance between a patient who responds to treatment and one who is able  
8 to enter the workforce, and that difference is borne out in [the] treatment notes,” which show that  
9 “although [plaintiff] had improved with treatment, she nevertheless continued to frequently  
10 experience bouts of crying and feelings of paranoia. The ALJ was not permitted to ‘cherry-pick’  
11 from those mixed results to support a denial of benefits.”). Thus, “[r]eports of ‘improvement’ in the  
12 context of mental health issues must be interpreted with an understanding of the patient’s overall  
13 well-being and the nature of her symptoms.” Garrison, 759 F.3d at 1017 (citing Ryan, 528 F.3d  
14 at 1200-01); see also Holohan, 246 F.3d at 1205 (“[The treating physician’s] statements must be  
15 read in context of the overall diagnostic picture he draws. That a person who suffers from severe  
16 panic attacks, anxiety, and depression makes some improvement does not mean that the person’s  
17 impairments no longer seriously affect her ability to function in a workplace.”).

18 Here, as she did with plaintiff’s physical treatment records, the ALJ reviewed plaintiff’s  
19 mental health records. [AR at 27-29.] She acknowledged that plaintiff was “receiving treatment  
20 with psychiatrist June Fujii, M.D., well before her alleged onset date” and, although Dr. Fujii’s  
21 notes were “largely illegible,” it was “clear” that as early as June 2011 plaintiff was diagnosed with  
22 PTSD, depression, a panic disorder, and ADD, had experienced an increase in depressive  
23 symptoms due to a job loss, and that Dr. Fujii made changes in plaintiff’s medications. [AR at 27-  
24 28.] After April 2013, plaintiff was treated by Tracy Cogbill, M.D., who reported that plaintiff was  
25 tearful and had poor insight and judgment, but otherwise, according to the ALJ, “was noted to  
26 have entirely normal responses” to the mental status examination. [AR at 28.] The ALJ noted that  
27 Dr. Cogbill stopped plaintiff’s ADD medication and then reinstated it when plaintiff reported she  
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1 had a “horrible” week without that medication; that Dr. Cogbill consistently noted that plaintiff was  
2 “stable” on her medications, and was “doing well” until September 2014 when she reported an  
3 increase in anxiety and depression, and her medication regimen was changed; that by December  
4 2014 she was again stable on her medications and was “noted to have only ‘some’ continued  
5 cognitive concentrating impairment”; that by June 2015 she was “doing fine” on her medications;  
6 and in October 2015, she was still “stable” on her medications despite the loss of her relationship  
7 with her fiancé, although she still exhibited a depressed mood. [AR at 27-28 (citations omitted).]

8 As with plaintiff’s physical treatment records, the ALJ appears to have improperly relied  
9 solely on a lack of objective medical evidence to discount plaintiff’s subjective symptom testimony  
10 regarding her mental health symptoms. Even if the ALJ implicitly included evidence of  
11 improvement as an additional reason to discount that testimony, as with her determination  
12 regarding plaintiff’s testimony regarding her physical symptoms, neither reason was a specific,  
13 clear and convincing reason supported by substantial evidence.

14 Remand is warranted on this issue.

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16 **3. Lay Witness Testimony**

17 The ALJ noted that she had considered the third-party statements completed by plaintiff’s  
18 friends, Peri Farris and Adrienne Hampton, and by plaintiff’s brother, William May. [AR at 29.]  
19 The ALJ stated the following regarding these statements:

20 The allegations of plaintiff’s friends and brother do not establish that [she] is  
21 disabled. Since they are not medically trained to make exacting observations as to  
22 dates, frequencies, types and degrees of medical signs and symptoms, or of the  
23 frequency or intensity of unusual moods or mannerisms, the accuracy of the  
24 allegations is questionable. Moreover, by virtue of their close personal relationships  
25 with [plaintiff], they cannot be considered disinterested third party witnesses whose  
allegations would not tend to be colored by affection for [plaintiff] and a natural  
tendency to agree with the symptoms and limitations [plaintiff] alleges. Most  
importantly, significant weight cannot be given to their allegations because they are  
simply not consistent with the preponderance of the evidence or the opinions and  
observations by the medical doctors in this case.

26 [AR at 29.]

27 “Lay testimony as to a claimant’s symptoms is competent evidence that an ALJ must take

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1 into account, unless he or she expressly determines to disregard such testimony and gives  
2 reasons germane to each witness for doing so.” Diedrich v. Berryhill, 874 F.3d 634, 640 (9th Cir.  
3 2017) (quoting Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001)).

4       However, a claimant’s personal relationship with the lay witness is not a valid reason to  
5 discount his or her observations. Diedrich, 847 F.3d at 640. The Ninth Circuit has held that  
6 “regardless of whether they are interested parties, friends and family members in a position to  
7 observe a claimant’s symptoms and daily activities are competent to testify as to his or her  
8 condition.” Id. (citing Valentine v. Comm’r Soc. Sec. Admin., 574 F.3d 685, 694 (9th Cir. 2009)  
9 (internal quotation marks omitted)); see also Smolen v. Chater, 80 F.3d 1273, 1289 (9th Cir. 1996)  
10 (“The fact that a lay witness is a family member cannot be a ground for rejecting his or her  
11 testimony. To the contrary, testimony from lay witnesses who see the claimant every day is of  
12 particular value; such lay witnesses will often be family members.”) (citation omitted). Thus,  
13 plaintiff’s close relationship with Farris, Hampton, and May is not a germane reason to discount  
14 the weight of their observations.

15       Next, the Court is not persuaded by the ALJ’s finding that because these lay witnesses are  
16 “not medically trained to make exacting observations as to dates, frequencies, types and degrees  
17 of medical signs and symptoms, or of the frequency or intensity of unusual moods or mannerisms,  
18 the accuracy of the allegations is questionable.” [AR at 29.] Lay witnesses are not required to  
19 have medical training, or to provide exact details of their observations. That is what makes them  
20 “lay” witnesses. Discounting the “accuracy” of a lay witness’ statement because the witness is not  
21 medically trained would allow an ALJ to routinely reject most such statements for this reason  
22 alone. Here, the witnesses merely offered their observations of plaintiff’s behavior in a succinct  
23 and straight-forward manner and did not represent that they were offering any sort of medical  
24 opinion. [See, e.g., AR at 248-49 (Hampton Statement); 250-51 (Harris Statement); 252-53 (May  
25 Statement).] This was not a reason germane to these witnesses to reject their statements.

26       Finally, a lack of support from the “overall medical evidence” is also not a proper basis for  
27 disregarding a lay witness’ observations. Diedrich, 847 F.3d at 640 (quoting Bruce v. Astrue, 557

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1 F.3d 1113, 1116 (9th Cir. 2009) ("Nor under our law could the ALJ discredit [the witness'] lay  
2 testimony as not supported by medical evidence in the record."). The fact that lay testimony and  
3 third-party function reports may offer a different perspective than medical records alone "is  
4 precisely why such evidence is valuable at a hearing." Id. (citing Smolen, 80 F.3d at 1289 (holding  
5 that ALJ erred where the ALJ rejected the testimony of claimant's family members about  
6 claimant's symptoms because the medical records did not corroborate those symptoms)). Thus,  
7 a lack of support from medical records is not a germane reason to give "little weight" to those  
8 observations.

9 Thus, none of the ALJ's reasons for discounting the lay witnesses' observations is  
10 germane. Remand is warranted on this issue.

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12 **B. REMAINING ISSUES**

13 Because the matter is being remanded based on the ALJ's failure to provide legally  
14 sufficient reasons for discounting plaintiff's subjective symptom testimony and the testimony of the  
15 lay witnesses, the Court will not address plaintiff's remaining issues herein.

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17 **VI.**

18 **REMAND FOR FURTHER PROCEEDINGS**

19 The Court has discretion to remand or reverse and award benefits. Trevizo, 871 F.3d at  
20 682 (citation omitted). Where no useful purpose would be served by further proceedings, or where  
21 the record has been fully developed, it is appropriate to exercise this discretion to direct an  
22 immediate award of benefits. Id. (citing Garrison, 759 F.3d at 1019). Where there are outstanding  
23 issues that must be resolved before a determination can be made, and it is not clear from the  
24 record that the ALJ would be required to find plaintiff disabled if all the evidence were properly  
25 evaluated, remand is appropriate. See Garrison, 759 F.3d at 1021.

26 In this case, there are outstanding issues that must be resolved before a final determination  
27 can be made. In an effort to expedite these proceedings and to avoid any confusion or  
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1 misunderstanding as to what the Court intends, the Court will set forth the scope of the remand  
2 proceedings. First, because the ALJ failed to provide specific, clear and convincing reasons,  
3 supported by substantial evidence in the case record, for discounting plaintiff's subjective symptom  
4 testimony, the ALJ on remand, in accordance with SSR 16-3p, shall reassess plaintiff's subjective  
5 symptom allegations and either credit her testimony as true, or provide specific, clear and  
6 convincing reasons, supported by substantial evidence in the case record, for discounting or  
7 rejecting any testimony regarding her mental and physical impairments and limitations. In making  
8 this assessment, the ALJ on remand shall also reassess the medical opinion evidence of record  
9 and must explain the weight afforded to each opinion and provide legally adequate reasons for  
10 any portion of the opinion that the ALJ discounts or rejects, including a legally sufficient  
11 explanation for crediting one doctor's opinion over any of the others. The ALJ on remand shall  
12 also reconsider the lay witness testimony and provide legally sufficient reasons germane to each  
13 witness if the ALJ determines that his or her testimony should be disregarded. Based on the ALJ's  
14 reassessment of plaintiff's subjective symptom testimony, the lay witness testimony, and the  
15 medical evidence of record, the ALJ shall consider the limitations, if any, resulting from plaintiff's  
16 physical and mental impairments, reassess plaintiff's RFC, and determine, at step five, with the  
17 assistance of a VE if necessary, whether there are jobs existing in significant numbers in the  
18 national economy that plaintiff can still perform.<sup>8</sup> See Shaibi v. Berryhill, 870 F.3d 874, 882-83 (9th  
19 Cir. 2017).

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28<sup>8</sup> Nothing herein is intended to disrupt the ALJ's step four finding that plaintiff is unable to return to her past relevant work.

vii.

## **CONCLUSION**

**IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**; (2) the decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant for further proceedings consistent with this Memorandum Opinion.

**IT IS FURTHER ORDERED** that the Clerk of the Court serve copies of this Order and the Judgment herein on all parties or their counsel.

This Memorandum Opinion and Order is not intended for publication, nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

Paul L. Abrams

DATED: May 4, 2018

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PAUL L. ABRAMS  
UNITED STATES MAGISTRATE JUDGE